IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

TEAM WORLDWIDE CORPORATION, Plaintiff, v. ACADEMY, LTD D/B/A ACADEMY SPORTS + OUTDOORS, Defendant.	Case No. 2:19-cv-92-JRG-RSP LEAD CASE
ACE HARDWARE CORPORATION,	Case No. 2:19-cv-00093-JRG-RSP
AMAZON.COM, INC, AMAZON.COM LLC,	Case No. 2:19-cv-00094-JRG-RSP
BED BATH & BEYOND INC.,	Case No. 2:19-cv-00095-JRG-RSP
COSTCO WHOLESALE CORPORATION,	Case No. 2:19-cv-00096-JRG-RSP
DICK'S SPORTING GOODS, INC.,	Case No. 2:19-cv-00097-JRG-RSP
THE HOME DEPOT, INC.,	Case No. 2:19-cv-00098-JRG-RSP
MACY'S, INC., MACY'S.COM, LLC,	Case No. 2:19-cv-00099-JRG-RSP
TARGET CORPORATION, and TARGET BRANDS, INC.,	Case No. 2:19-cv-00100-JRG-RSP
SEARS, ROEBUCK AND CO., SEARS HOLDINGS CORPORATION, and TRANSFORM HOLDCO LLC, Defendants.	Case No. 2:20-cv-00006-JRG-RSP CONSOLIDATED CASES

DEFENDANTS' OBJECTIONS TO ORDER ON DEFENDANTS' MOTION IN LIMINE NO. 1

Pursuant to Fed. R. Civ. P. 72(a) and Local Rule CV-72(b), Defendants respectfully object to the Magistrate Judge's Order on Motion in Limine No. 1 (Dkt. 439 ["Order"]) on the grounds that the Magistrate Judge overlooked the undisputed fact that TWW admitted it "failed to link any disclosure contained within the ['760] Patent to any limitation in the asserted claims," and governing law is clear that "written description support for the asserted claims must be found in the ['760] Patent" to assert an earlier priority date. *Cordance Corp. v. Amazon.com, Inc.*, 658 F.3d 1330, 1334–35 (Fed. Cir. 2011). Accordingly, because of these clear factual and legal errors, Defendants respectfully object to the Magistrate Judge's Order and ask the Court to preclude TWW from proffering testimony or making any statement insinuating that the '760 Patent provides an earlier priority date for the '018 Patent.[1]

In the Priority Date Motion briefing—which the Magistrate Judge considered as part of the Order (*see* Dkt. 439 at 3)—TWW did not contest Defendants' Statement of Undisputed Material Fact No. 7, which reads:

> The '331 Application is also a continuation-in-part of Patent Application No. 09/542,477 (the "'477 Application"), which was filed on April 4, 2000 and resulted in U.S. Patent No. 6,332,760 (the "'760 Patent," Ex. 6). ('018 Patent, ref. (60).) However, the '760 Patent lacks any disclosure related to Figures 13A, 13B, 14, and 15 from the '018 Patent. (*Compare generally* Ex. 6 ['760 Patent], *with* '018 Patent.) Indeed***, TWW has failed to link any disclosure contained within the '760 Patent to any limitation in the Asserted Claims***.[2]

[1] The Magistrate Judge correctly held that "Under 35 U.S.C. § 104, it is impermissible for TWW to establish a date of invention by reference to knowledge or use of the invention if it was only available in China or Taiwan." (Dkt. 439 at 4.) However, the Court also held "the restriction of § 104 applies to a specific use of the evidence, not the actual evidence itself." (*Id.*) Because TWW has not timely disclosed a "permissible" use for this evidence (specifically, PTX-COM-241, -241, and -302), TWW should be precluded under the Magistrate Judge's Order from reliance on these exhibits. Defendants address this issue in their Objections to the Pre-Admission of PTX-COM-240, -241, and -302 (Dkt. 414) and Proposed Reply (forthcoming).

[2] This is consistent with TWW's positions in the Priority Date Briefing that the '760 Patent does not support the accused claims, and thus cannot provide an earlier priority date. (*See, e.g.*, Dkt. 259 at 4 ("Absent Defendants' tortured interpretation of [the Chaffee] provisional application, TWW has not asserted that it is entitled to a priority date of April 4, 2000 based on the disclosure

(Dkt. 208 at 3 (emphasis added); Dkt. 259 at 2 (failing to dispute SUF No. 7).) "Under Local Rule CV-56(c), the court assumes that the facts as claimed and supported by admissible summary judgment evidence by the moving party are true, unless controverted by the non-moving party in its response and supported by admissible summary judgment evidence." *Regions Equip. Fin. Corp. v. AT 2400, Off. No. 530775*, No. 1:10-CV-215, 2010 WL 11531292, at *3 n.5 (E.D. Tex. Sept. 2, 2010), *aff'd*, 640 F.3d 124 (5th Cir. 2011). The Magistrate Judge did not, however, address this motion-determinative admission in the Order, instead focusing solely on the inventor's statements[3] that the '760 and '018 Patents were unrelated. (Dkt. 439 at 3.)

But with that admission, TWW conceded that the '760 Patent is irrelevant to the priority date of the asserted claims of the '018 Patent under black letter Federal Circuit law and FRE 401. Specifically, as explained in Defendants' motion *in limine* and summary judgment briefing, the Federal Circuit held in *Cordance* the "failure to link any disclosure" contained in an earlier application to "any limitation in the asserted claims" prevented the asserted claims from receiving the benefit of the filing date of the earlier application as a matter of law. *Cordance*, 658 F.3d at 1334–35; *see also Power Oasis, Inc. v. T-Mobile, Inc.*, 522 F.3d 1299, 1306 (Fed. Cir. 2008) ("It is ***elementary patent law*** that a patent application is entitled to the benefit of the filing date of an earlier filed application ***only if*** the disclosure of the earlier application provides

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of TWW's U.S. Patent No. 6,332,760 ('the 760 Patent'), a parent patent to the '018 Patent."); Dkt. 325 at 1 ("TWW did not dispute that its U.S. Patent No. 6,332,760 ("the 760 Patent"), a parent patent to the '018 Patent, discloses a socket-style pump and not a built in pump.").) To the extent TWW argues that the '760 Patent is necessary to interpret the Chaffee prior art, that argument has no bearing on the priority date analysis—indeed, TWW has cited no case law supporting this argument. (Dkt. 259 at 4.)

[3] The inventor's statements (*see* Dkt. 208-3) are consistent with TWW's other admissions, but are not determinative. It is TWW's admission that the disclosure of the '760 patent does not support the asserted claims—which the Magistrate Judge overlooked—that is critical to the analysis.

support for the claims of the later application, as required by 35 U.S.C. § 112." (internal quotation omitted, emphasis added)). Here, TWW repeatedly admits that the '760 Patent fails to provide support for the asserted claims. (Dkt. 259 at 2 (failing to dispute that "TWW has failed to link any disclosure contained within the '760 Patent to any limitation in the Asserted Claims."); Dkt. 325 at 1 ("TWW did not dispute that its U.S. Patent No. 6,332,760 ('the 760 Patent'), a parent patent to the '018 Patent, discloses a socket-style pump and not a built in pump."); Dkt. 259 at 4 ("TWW has not asserted that it is entitled to a priority date of April 4, 2000 based on the disclosure of TWW's U.S. Patent No. 6,332,760 ('the 760 Patent'), a parent patent to the '018 Patent.").) As a matter of undisputed fact and black letter law, TWW cannot rely upon the '760 Patent for purposes of asserting an earlier priority date. The Magistrate Judge's failure to recognize TWW's admission and apply the correct legal precedent is clear error.

CONCLUSION

Accordingly, Defendants respectfully object to the Magistrate Judge's Order regarding Defendants' motion *in limine* No. 1.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was filed electronically in compliance with Local Rule CV-5(a). Therefore, this document was served on counsel of record, all of whom have consented to electronic service, on June 3, 2021.

/s/ Bethany N. Mihalik